No. 6, 7, 8

February 16, 1933
10c a Copy

Volume 8, Number 6
$1 Per Year

The Los Angeles Bar Association
BULLETIN

Official Publication of the Los Angeles Bar Association, Los Angeles, California

Effect of Decision by the Supreme Court in the Bentley Case

Sharpshooting at the State Bar

Status of Los Angeles Superior Court Civil Calendar for the Year 1932

Memorial on the Life and Services of William Jefferson Hunsaker

The Work of the State Bar of California

Law Student Bar Association

Recent Income Tax Decisions of Supreme Court of United States of Interest to Oil Industry

Members: You are invited to be guests of the Los Angeles Lodge of Elks, No. 99, at the clubhouse, on Wednesday evening, *February 22, 1933.* A most interesting program has been arranged for your entertainment, to commence at 8:30 P. M.

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OVERRULED CASES *are pointed out in*

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Effect of Decision by Supreme Court in the Bentley Case

MAY THE HOLDER OF A NOTE SECURED BY A VALUABLE TRUST DEED ATTACH IN AN ACTION ON THE NOTE?

By Hugh W. Darling, of the Los Angeles Bar

THE SUPREME COURT OF CALIFORNIA has finally relieved the Bar of the dilemma under which it has been laboring so long with respect to the effect of C.C.P 726 on Trust Deeds. *Bank of Italy v. Bentley,* 84 C. D. 214, holds in unequivocal language that C.C.P. 726 has no application to Trust Deeds; and that the holder of the note may file an action on the note without first "foreclosing" the Trust Deed. Moreover, by inescapable inference, the case decides that by filing an action on the note the holder does not waive the security, as the plaintiff first filed an action, followed by a sale under the Deed of Trust, after which an amended complaint was filed in which credit was given for the proceeds received at the sale.

However, in removing one dilemma the Bentley case substitutes another of considerable, if not equal, irritation to the Bar. Will a promissory note, secured by a Trust Deed which has not become valueless, entitle the holder to a writ of attachment.

Trust Deed Not a Mortgage

C.C.P. 537 provides that the plaintiff may have the property of the defendant attached in an action upon a contract "where the contract is made or is payable in this state, and is not secured by any *mortgage* or *lien* upon real or personal property * * *". The Bentley case definitely decides that a Trust Deed is not a mortgage. *Slosson v. Glosser,* 5 Cal. Unrep. 460, holds that a claim secured by a surety bond will not prevent an attachment "since such security does not prevent the right of attachment." Consequently, if a Trust Deed is not a lien, although admittedly a security of some form, the holder of the note should be entitled to the benefits of attachment.

Unfortunately, we have no legislative enactment defining or definitely determining the legal effect and status of the present day Trust Deed. However, we have a few code sections which afford some assistance in drawing an interpretation. Section 2872 of the Civil Code defines a lien as follows: "A lien is a charge imposed in some mode *other than by a transfer in trust* upon specific property by which it is made security for the performance of an act." This section would appear to exclude a Trust Deed from the classification of a lien, as the very essence of a Trust Deed is a transfer in trust. It might be argued that at the time C.C. 2872 was amended in its present form (1878) by adding the words "other than by a transfer in trust" the Legislature could not have had in mind the present day Trust Deed; but such argument would be subjected to the attack of many early cases upholding the validity of Trust Deeds, commencing with *Koch v. Briggs,* 14 Cal. 256 (decided in October, 1859). C.C. 2888 provides that: "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

Does Not Pass Title

A Trust Deed does pass title, although, as has been held, the trustee merely acquires the naked legal title. C.C. 2889 provides that: "All contracts for the forfeiture of property subject to a lien, and satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."; and C.C. 2903 provides that: "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit." These two sections seem to indicate that a right of redemption is one of the attributes of a lien, which right has been held repeatedly not to attach to a Trust Deed. C.C. 2911 states: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

Los Angeles Bar Association Bulletin

VOL 8 | FEBRUARY 16, 1933 | No. 6

Official Publication of the Los Angeles Bar Association. Published the third Thursday of each month. Entered as second class matter August 8, 1930, at the Postoffice at Los Angeles, Calif., under the Act of March 3, 1879.

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Sharpshooting at the State Bar, Legislator Would Admit All Veterans to the Bar on Motion

APPARENTLY Mr. Assemblyman Craig, a mechanical engineer representing the 75th Assembly District, Los Angeles County, would like to have unemployed veterans "blanketed" into the legal profession under the provisions of his bill to amend the State Bar Act. He wants any person who has served during war to be admitted to the Bar, on motion.

Listen to this, all you lawyers who have spent four or more years in a law school, and then, perhaps, waited four more for your first client:

"Any person who has served in the army, navy, marine corps, or other armed force of the United States, in time of war, and has received an honorable discharge therefrom, and who has been a resident of the State of California for at least one year prior to the passage of this act, and who at any time within one year after the date of such passage possesses the necessary qualifications of learning and ability, as well as age, residence and citizenship, to entitle him to take the examinations prescribed for admission to the bar of this state or who has been admitted to practice law outside of this state, may, upon motion duly made, by a regularly practicing attorney in good standing, be admitted to practice law in all courts of the State of California by the Supreme Court of this state."

President Crump of the State Bar, discussing this bill at a recent meeting of the Alameda Bar Association at Oakland, said:

"It is hardly necessary to take time in a discussion of the bill introduced in the Legislature proposing to admit World War veterans to the bar without examination. No more ridiculous proposition has ever been suggested, and I shall not insult a body of lawyers by saying anything further on this subject. I may, however, be permitted to inquire as to why the legal profession was singled out as an avenue of escape from unemployment. In the words of a San Francisco assemblyman, who has not always been a friend of the State Bar, but who professes a considerable amount of common sense, 'Why wish them on the legal profession; why not make doctors out of them?'

It is well settled that the running of the Statute of Limitations on the debt secured by a Trust Deed does not affect the right of the trustee to sell the property in payment of the debt (*Sacramento Bank v. Murphy*, 158 Cal. 390). It is clear that in order to construe a Trust Deed as a lien it would be necessary to ignore the code sections to which reference has been made, as the recognized and established characteristics of a Trust Deed cannot possibly be reconciled with these sections.

Analysis of Trust Deed

Probably the most comprehensive analysis that has been applied to a Trust Deed is found in *Weber v. McCleverty*, 149 Cal. 316. The plaintiff acquired title to certain real property at a trustee's sale under a Trust Deed, and thereafter brought an action to recover possession. The defendant contended that under C.C.P. 1475 the holder of the note and Trust Deed was obligated to file a claim against the estate of the maker, who had filed a homestead on the property; and that, as a result of the holder's failure so to do, the sale was void. At that time C.C.P. 1475 provided that claims secured by *liens* or *encumbrances* against property on which a homestead existed had to be presented and allowed as other claims against the estate; and that enforcement of the security could only be had for a deficiency. The court held that if the Trust Deed was neither a lien nor an encumbrance the statute would have no application, and the sale would be valid without the previous presentation of a claim, and then proceeded to analyze the nature of a Trust Deed in part as follows:

Page 319: "It is true that it is the policy of the law to favor homesteads to a certain extent, for the protection and preservation of homes and families. But there is a limit beyond which this policy should not be allowed to control. It should not be invoked for the purpose of establishing a new application and interpretation of a statute, contrary to its true meaning and in the face of a long-established understanding and usage based on its true meaning. The different codes are to be harmonized and construed together as parts of the same statute, as far as may be reasonably possible. (Pol. Code, Sec. 4480.) Language in one code is often used with reference to similar language, or definitions thereof, contained in another one of the codes. The present case is an instance of this use. The Code of Civil Procedure nowhere defines the term 'encumbrance.' In the Civil Code, however, we find its meaning clearly stated. Section 1114 of that code, following a section concerning the effect of covenants against encumbrances on land, declares that 'The term 'encumbrances' includes taxes, assessments, and all liens upon real property.' In section 2872 of the Civil Code, in the chapter relating to liens, a lien is defined as follows: 'A lien is a charge, imposed in some mode *other than by a transfer in trust*, upon specific property, by which it is made security for the performance of an act.' A deed of trust is not a tax or assessment, and being, by the terms of the definition, excluded from classification as a 'lien,' it follows from the language of section 1114 that it is not an encumbrance. Section 1180 of the Code of Civil Procedure defines the term 'lien' thus: 'A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.' The language is the same as in the Civil Code, except that the words 'in some mode other than by a transfer in trust' are omitted in the Code of Civil Procedure. If this language could be given a meaning broad enough to include a transfer in trust, which is doubtful, it would have no effect in this case. In that event it would be inconsistent with section 2872 of the Civil Code, which was amended in 1878, six years after the enactment of section 1180 of the Code of Civil Procedure. Section 1180, being the earlier enactment, would be repealed by the latter statute, so far as the two were inconsistent. Furthermore, as section 1180 of the Code of Civil Procedure constitutes the introductory part of title IV of that code, which title relates to the subject 'of the enforcement of liens,' its scope should be limited to the liens provided for in that title, and it should not be held to refer to deeds of trust, the foreclosure of which is not there provided for.

In legal effect, a deed of trust does not create a lien or encumbrance on the land, but conveys the legal title to the trustee. In order to execute the trust he must be by the deed so far invested with the absolute title to the land as is necessary to enable him to convey it to the

purchaser at the trustee's sale free of all right, title, interest, or estate of the trustor, or of any one claiming under or through the trustor by virtue of any transaction occurring after the making of the trust deed. The deed of trust, therefore, vests in the trustee, for the purposes of the trust, the absolute legal title to the entire estate held by the trustor, immediately prior to its execution, and that estate must remain in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt. It is consequently legally impossible for the trustee, in his fiduciary capacity, to hold a lien or encumbrance on the land which is the subject of his trust. The existence of a lien or encumbrance vested in one person necessarily implies that the title to the property, interest, or estate covered by the lien or encumbrance is vested in some other person. One cannot at the same time hold an estate in real property and a lien or encumbrance upon that particular estate. The trustee holds title to the entire estate for the purpose of conveying it when required in execution of the trust, and he cannot at the same time hold as trustee a lien on the same estate, for that would necessarily imply that the title to the estate was not vested in him. The estate of the trustee in the land is consequently not a lien thereon, even as that term is defined in section 1180 of the Code of Civil Procedure, conceding it to be in force. It is not a charge on the land, but the very land itself." * * *

Page 323: "The claim or interest of the trustees, *not being either a lien or encumbrance* on the homestead, and the homestead right being subsequent to the deed in point of time and subordinate to it in all respects, it follows that the conveyance of the trustee related back to the estate of the trustor at the time he executed the trust-deed, and transferred to the purchaser the entire right, title, interest, and estate in the land then vested in the trustor, thereby completely extinguishing the homestead."

Some Comfort Here

It is true that some comfort might be found, by those who contend against the right to attach on a note secured by a Trust Deed, in some statutory enactments and in some decided cases. As an example, C.C. 453 provides in part: "The term 'security' wherever used in this chapter, without a different meaning being specified or made apparent, shall be construed to refer to and include within its meaning a note or notes, or bond or bonds, together with the mortgage or Deed of Trust securing the same, which evidence a debt secured by a first lien on a marketable title in fee to real estate, or to real estate with improvements thereon." After a cursory examination of our statutory law, this appears to be the only section in which the word "lien" is wedded to a Trust Deed by our legislators. In view of the fact that the quoted portion of the section merely defines the term "security," under which classification a Trust Deed admittedly falls, it is hardly entitled to the weight that would be necessary to overthrow the several code sections which by their terms expressly exclude Trust Deeds from the classification of liens. *Fickling v. Jackman*, 203 Cal. 657, holds that: "By a long line of decisions in this state a deed of trust is a lien or other encumbrance within the meaning of that section (C.C.P. 1186)." However, it is interesting to note that in 1931 the Legislature amended C.C.P. 1186 by expressly including Deeds of Trust, which would indicate that the Legislature did not believe that a Deed of Trust was covered by the words "any lien," which were in the section before its amendment.

Illogical Position

It is likewise true that a Deed of Trust has been held not to be such an interest in real property as requires the trustee or the beneficiary to file a notice of non-responsibility under C.C.P. 1192. This principle was upheld in *Hollywood Lumber Co. v. Love*, 155 Cal. 270; but the court somewhat apologetically leaned on the rule of *stare decisis* in defense of its rather illogical position. Notwithstanding that it is now settled that a Trust Deed does not create an interest in real property, as contemplated by C.C.P. 1192, such distortion does not make a lien out of a Trust Deed, nor does it even offer a convincing argument in support of such a theory. In *Shuey v. Mulcrevy*, 34 Cal. App. 218, the plaintiff attempted to attach in an action on interest coupons of bonds of a Railroad Company secured by "a mortgage or Deed of Trust." The attachment was dissolved, but in dissolving it the court held: "The Trust Deed referred to in the petition which was

given as security for the payment of the bonds and the interest coupons attached thereto *must be regarded as and is in effect a mortgage;* and it is conceded that in an action by the bondholders against the Railway, *mortgagor,* the former could not by virtue of the provision of C.C.P. 537-38 procure a writ of attachment."

In *Corum v. Superior Court,* 114 Cal. App. 741, the plaintiff sued and attached on a note secured by a Trust Deed. After the complaint had been filed the Trust Deed was "foreclosed," after which the plaintiff amended the complaint, giving credit for the proceeds received on the sale, and filed an amended affidavit on attachment, alleging that the security had become valueless. The only points involved were whether or not an amended affidavit on attachment could be filed; and if so, whether it was sufficient. The failure of the court to give any consideration to the question of plaintiff's right to attach regardless of the value of the security might be advanced as an argument against the right to attach on a note secured by a Trust Deed, but it would be rather far-reaching to suggest that a principle of law becomes established through silence of our judicial officers, or by their disposition to ignore a point that might have been raised.

Purpose of Attachment Sections

It might be said that the purpose of our attachment sections is to grant to an unsecured creditor the privilege of protecting his claim pending judgment, but had that been the intention of the Legislature it would have been a simple matter to limit the right of attachment to unsecured claims, which would be all embracing. The Legislature not having elected so to limit the right, those who are not expressly excluded by the statutes should not be denied the privilege by judicial legislation.

Inasmuch as the right to attach was not a part of the common law, it is purely statutory and should be strictly construed. However, that strict construction applies with equal force to those who may be benefited as well as to those who may be burdened by the enactment.

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"WHAT SAY THE JURY"

A PLAY IN ONE ACT

By Jacob J. Lieberman, of the Los Angeles Bar

"Go to, let us go down, and there confound their language, that they may not understand one another's speech."

GENESIS, 11:7.

SCENE: A Jury Room.

TIME: Immediately following the court's charge to the jury and retirement to the jury room for deliberation on the verdict. The foreman has just been elected.

CHARACTERS: 12 Jurors.

Foreman: Shall we take a ballot on our verdict?

Juror No. 2: No, let's discuss the case first. I'm all muddled up about the law.

Foreman: Well, didn't you hear the court's instructions?

Juror No. 2: Sure, but he read about 20 or 30 of them. I don't remember them. When he read some, I thought I ought to decide for the plaintiff, then he read some later on which made me feel I ought to decide for the defendant.

Other Jurors (in chorus): Yes, that's just how we felt!

Juror No. 11: Yes, and besides, didn't that lawyer for the plaintiff tell us some points of law, though! I think he's right, and I'm for the plaintiff!

Juror No. 7: Well, I'm for the defendant! You don't seem to remember what the defendant's lawyer said. Gee, he's a clever guy!

Juror No. 5: Wasn't he nice! Did you notice his hair? I wish I had his permanent! Oh, wasn't it gorgeous?!!

Juror No. 3: Aw, what's that got to do with the law! Anyway, I don't remember that the judge's instructions sounded anything like what those two lawyer guys told us was the law.

Juror No. 4: I think they're all wet! I never heard so many different and conflicting things told me before. Why, we've all heard for years what the law is! It's nothing like what they've been telling us. Besides, it's not justice. They're all technicalities. You don't catch me with those tricks. They don't get away with it with me! No, sir! I know what the law is, and so do all of you.

Juror No. 8: That's right. Let's cut out all the fussing about what was or wasn't told us. Let's get down to the facts, and do justice!

Juror No. 10: It seems to me, I heard somewhere, that the law is substantial justice, and it's supposed to apply equally to all. If so, we're supposed to get the law from the court. I guess they give the same kind of instructions in each case, don't they? Anyway, didn't we tell the judge, when we were being examined at the opening of this case that we would be guided solely by the court's instructions as to the law?

Juror No. 12: What a situation! What a system! They ask us to swear that, so far as the law is concerned, we shall be guided solely by the law as given us by the court. Then they let one lawyer tell us the law is so-and-so. He is followed by this opponent, who says, no, it isn't; it's thus-and-so. Then the judge reads us a long set of instructions and tells us the law is this-and-that. So, they let us leave the court room to come here to deliberate—and they don't even give us that long list of instructions, which, I venture to say, even the judge and the lawyers don't remember by this time. They write libraries on the subject, and scrap for days before the judge decides whose instructions to give, and then they expect us, after one reading, to remember them! Worse than that, we're here with three sets of law given us in the court room, conflicting with each other and with our individual preconceived predilections! Here we are, all befuddled on the law, and we haven't even discussed any of the facts! Oh, confusion worse confounded! It seems to me there are two things they ought to do, and this system ought to be changed accordingly, if they want us to follow the law. They ought to have the judge read us the law, before the lawyers argue.

Status of Los Angeles Superior Court Civil Calendar for the Year 1932

By Marshall F. McComb, Judge of the Superior Court

FROM TIME IMMEMORIAL in this county it has been the practice to lay the majority of the evils in the administration of justice to two things; first, the delay incident to the trial of civil cases; second, the congestion obtaining in the department or departments from which cases are assigned for trial. In fact, so accustomed had the profession become to both of these complaints that they were accepted by most of us as necessary incidents to litigation.

Due to the deplorable conditions which had obtained for a period of years and finally culminated in practical stagnation in our court, in the latter part of the year 1931 public opinion forced the profession to take cognizance of the situation and take adequate steps to alleviate the condition then obtaining.

The matter was made the subject of consideration by the judges of our court with the result that a special department was created for the purpose of handling the mechanical details in connection with the distribution of civil cases, the judge of this department to be responsible to the presiding judge of the court for the prompt distribution of business. The result of this new method of handling our civil calendar is best shown by the following facts and statistics:

Condition of the Calendar as of December 8, 1931

Cases set for trial	1,784
Cases in which setting cards had been filed but remaining unset	4,805
Total cases at issue and untried in which setting cards had been filed	6,589

Condition of the Calendar as of January 8, 1933

Cases set for trial	1,209
Cases in which setting cards had been filed but remaining unset	—0—
Total cases at issue and untried in which setting cards had been filed	1,209
Total number of cases handled from December 8, 1931 to January 8, 1933	15,622

From the foregoing facts it is apparent that during the period stated the Superior Court disposed of 14,413 cases, leaving as of January 8, 1933 only 1,209 cases undisposed, all of these being set for trial dates prior to, or on or about March 15, 1933. Attention should here be directed to the fact that in December, 1931, of the 1,784 cases then set for trial the last was set for trial for a date four months later and of the 4,805 cases then awaiting setting it was estimated that they would be reached for trial some eighteen to twenty months later.

Reasons for Changed Conditions

The first and most important reason for the excellent condition of our calendar at the present time lies in the fact that both the bench and the bar were willing to cooperate with the plan that was adopted for the elimination of the delay and congestion.

Secondly, the calendars were set with a knowledge of the judges that would probably be available for the trial of cases, and such factors as assignments to the Appellate Court, absences due to illness, vacations, etc., were taken into consideration.

Third, additional judges were assigned from other counties and from the Municipal Court, for the purpose of clearing up the cases which had accumulated. It is to be noted that with one exception all Municipal Court judges have returned to their court.

Fourth, a rule was adopted whereby a case was not continued for trial except where counsel for either party was actually engaged in trial. The effect of this rule was: first, to keep the calendar in such a condition that the court knew at all times approximately the number of cases that would be ready for trial on any given date; second, from the cases which went off calendar for any reason, approximately only a third were subsequently restored and brought to trial. This rule has not worked a hardship upon either litigants or counsel since a case which has been upon the calendar once can be promptly restored for trial within a period of ten days upon stipulation of counsel, or, in the absence of such stipulation upon the motion of either counsel.

Fifth, the use of the telephone by the Calendar Department for the purpose of ascertaining in advance when cases were ready for trial, and for assigning cases to specific departments on the day preceding the trial.

The Congestion Problem

It is interesting to note that in addition to bringing the trial of cases down to a point where a case at issue may be tried within five weeks after a setting card has been filed, the congestion problem has been practically eliminated. This is very graphically shown by the fact that of the 14,924 cases handled during the calendar year 1932, only 3-1/10 per cent were not tried on the day set for trial, for lack of available courts. Even further improvement has been made during the month of January, 1933, as, of the 863 cases handled during that period only 1-2/10 per cent were not tried on the day set for trial, because of lack of available courts.

It is obvious to anyone who cares to familiarize himself with the present condition of our Superior Court calendar that the criticism can no longer be truthfully made that our Superior Court is far behind and that there is congestion in the distribution of business. The fact is that our court is up-to-date with its calendar and that there is no court of a similar jurisdiction in a large metropolitan center in the United States that even compares favorably with that of Los Angeles in the matter of expedition of business. In addition it should be noted that the criminal calendar under Judge Elliot Craig has kept pace with the civil calendar, and at the present time criminal trials are promptly heard and disposed of.

For the convenience of those who may be interested, there follow detailed schedules of the work handled by the civil departments of the Los Angeles Superior Court, for the months from January, 1932, to February 1, 1933. These schedules do not include defaults, probates, preliminary domestic relations, hearings, law and motion, short cause or juvenile matters.

SCHEDULE I.

1932	Cases Put Off Calendar	Cases Transferred for Trial	Total Cases Handled	Total Cases Continued for Lack of Courts	Percentage of Continued Cases to Total Cases Handled
January	402	331	733	1	.001
February	629	450	1079	3	.003
March	795	505	1300	2	.001
April	781	545	1326	31	.02-3/10
May	745	556	1301	13	.01
June	782	609	1391	44	.03-2/10
July	714	584	1298	3	.002-5/10
August	764	572	1336	7	.005-3/10
September	829	500	1329	32	.02-2/10
October	863	588	1451	42	.03
November	733	497	1230	107*	.08-7/10
December	649	501	1150	175*	.15-2/10
Total	8686	6238	14924	460	.03-1/10
1933					
January	448	415	863	11	.01-2/10

* The large number of cases continued for lack of courts in the months of November and December were due to the fact that the court endeavored to reduce the number of Judges sitting on the court, below the minimum anticipated at the time the calendars were set for trial.

SCHEDULE II.

REGULAR SETTINGS 1932.

	Motions to Set and Restorations	Divorce Cases Filed	Civil Cases Filed	Total Cases Filed
January		584	1473	2057
February	1222	616	1605	2221
March		713	1878	2591
April	554	694	1781	2475
May	462	698	1571	2269
June	495	744	1565	2309
July	454	691	1398	2089
August	648	777	1448	2225
September	498	718	1456	2174
October	599	691	1412	2103
November	486	642	1331	1973
December	719	524	1297	1821
	6137	8092	18,215	26,307
		1933		
January	1009	678	1320	1998

Michael Bilz

We, the Executive Council of the Junior Committee of the Los Angeles Bar Association, meet in silent tribute to a friend.

Mike Bilz has in one sense left us. Yet, even as we gather again to honor him, we feel his presence; our hearts tell us that he is not away.

No man who has built strong, fine friendships, commanded the respect of his associates, and been beloved by them, has lived in vain.

We are grateful for Mike's friendship and the all too few years he spent among us.

LOWELL MATTHAY,
Chairman Junior Committee.

Mr. Bilz was a native of Des Moines, Iowa. He attended Drake University, and after graduating came to California and entered Stanford Law School. He graduated with a degree of Doctor of Jurisprudence, and was one of the honor students of his class. He was secretary of the Constitutional Rights Committee of the Bar Association; was a member of Delta Theta Phi Fraternity; and during this year was First Vice-President of the Junior Committee of the Los Angeles Bar Association.

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Memorial on the Life and Services of William Jefferson Hunsaker

"William Jefferson Hunsaker, a distinguished lawyer of the California Bar and a former President of the Los Angeles Bar Association, died at his residence in the City of Los Angeles on January 13, 1933. He was a native of this state, born September 21, 1855, on a farm owned by his grandfather, Daniel Hunsaker, in the County of Contra Costa. His parents were Nicholas and Lois E. (Hastings) Hunsaker. His people were pioneers on this coast—his father having come to California in August, 1847, and Lansford W. Hastings, an uncle of his mother, having been domiciled here as early as 1843, and later became a member of the convention which met at Monterey and framed the first constitution of the state in 1849, upon which the state was admitted to the Union in the following year.

"In the year 1869 Nicholas Hunsaker removed with his family to San Diego in this state, where a few years later he was elected to and held the office of Sheriff of the County. His son William J. had his education in the public schools of Contra Costa and San Diego counties, and a private academy at San Diego, and while yet a very young man entered upon the study of law, for which he developed extraordinary aptitude; he was admitted to practice in the state District Court at San Diego in the year 1876, a time before the creation of the Superior Court system of the state by the Constitution of 1879. Later, in the year 1882, he was admitted to the Bar of the Supreme Court of California—having meanwhile spent two years or thereabouts in the practice of law at Tombstone, Arizona—and in the same year (1882) was elected District Attorney of San Diego County, California; he served one term in that office, had next some eight years of very successful private practice at San Diego, was the pioneer Mayor of that city, elected under its Charter first providing for that office, adopted in the year 1887; and in 1892 removed to Los Angeles, where he was for a time Solicitor of the A. T. & S. F. Ry. Co. representing its lines in California; was admitted to the bar of the Supreme Court of the United States in 1893; and continued in the practice of law in the State and Federal Courts until the time of his death. For above five years at San Diego, and for thirty years in Los Angeles, from 1900 to 1930, he had as a partner in the practice E. W. Britt, and beginning in 1920, and continuing until the decease of Mr. Hunsaker, T. B. Cosgrove was a member of the firm—as also has been in more recent years Frank J. O'Neil.

"Mr. Hunsaker was married to Florence Virginia McFarland at San Diego in the year 1879; she died November 24, 1922; three children survive them—a son, Daniel McFarland Hunsaker, for a number of years a member of the firm with his father and yet active at the Los Angeles Bar; and two daughters, Mary Hunsaker Brill and Rose Hunsaker Steehler.

"Thus much for a brief outline of Mr. Hunsaker's domestic and more immediate professional relations.

"He held membership in the California Club and the Los Angeles Athletic Club; also in the City Club of Los Angeles, the Municipal League, the California Historical Society, American Judicature Society, West Gate Lodge No. 335, F. & A. M., and several other organizations of social and civic character. He was a member of the American Bar Association in and after the year 1898; a member of the Los Angeles Bar Association, becoming such in 1892, and was President of the same in the year 1904; a member of the California Bar Association upon its organization in 1909 (a statewide association of lawyers preceding the present incorporated State Bar), and was elected and served as President thereof in the official year 1913-14. He was active in the formation of the State Bar both before and after the passage of the statute (of March 31, 1927) creating that body a public corporation; became a member of the first Board of Governors upon its organization in November, 1927; also became Chairman of Local Administrative

Committee No. 1 for Los Angeles, supervising State Bar activities at the City of Los Angeles in effectuating the policies of the Board of Governors; and in numerous ways and with great earnestness promoted the organization and establishment of the incorporated self-governing Bar of California.

"It is difficult to present within the proper limits of a report of this nature an adequate estimate of the personal and professional character and worth of William J. Hunsaker; but reasonable brevity is desirable, and we shall generalize our views touching a few of his dominant qualities. He was a man sedulously observant of his obligations—to his family, a term which to him had a wide significance—to his friends, to his clients, his profession, and the body politic. He was one of the comparatively few of whom it may be truly said that he was 'generous to a fault'; this was a marked element of his character in all the relations we have just mentioned, and it included not merely the administration of his substance but the outgiving of his kindly spirit of sympathy among those whose righteous claims of any nature upon him he recognized—and sometimes among those he suspected to be undeserving and ungrateful.

"He was a tolerant man,—with the qualification, perhaps, that he had no great charity toward transgressors of the code of ethics of the legal profession whether in or out of public office. In politics he was by inheritance and education a Democrat, but this inclination was controlled by the tolerance we have just mentioned. He often voted and labored for the election of Republicans to high office when he deemed that the general interest would be better served by them.

"A motive powerful with Mr. Hunsaker was his attachment to his profession and his concern that it should merit and maintain its proper station of influence in the esteem of all the people. His devotion to his calling, its organized activities, to its usefulness in the present age and in ages to come, amounted to an enthusiasm. To him the profession of a lawyer was charged with exalted duties but strict limitations on its privileges of self-service. He saw in it a high social and governmental agency. He believed that the main ethical office of mankind is the establishment of justice; that this is a condition to be best promoted (in the present state of human intelligence) through a system of courts where all the judges will be able and unsullied men, and all the advocates at the bar will be competent and upright men. He agreed that the only justice on earth is man-made justice, and at present this is very imperfect. for as he said 'man is an imperfect creature'; and it was his aspiration that with tribunals and instrumentalities of justice conforming to standards of conduct which are practicable of attainment, the world may yet see (to use a line or two of Browning's rugged verse),

> 'As God in heaven, vice prostrate.
> Virtue pedestaled, the triumph of truth at last.'

"No lawyer had a clearer understanding than Mr. Hunsaker of the duty owed to the interests of clients, and of the obligation to preserve for them the things that are theirs by the voice of law and right; but also he advocated another concept which can hardly be more effectively expressed than it has been in the language of one of our American courts:

> 'It would be deplorable indeed if a lawyer felt that he was under an obligation to his client to maintain positions which did not accord with his own notions of law and justice, simply because they tended to his client's advantage. The lawyer owes a duty to the court, to himself, and to society, as well as to his client; and the conduct of those who have reached the highest position in our profession proves that he cannot render the most efficient service to his client if he fails in the performance of those other duties.'

"Probably no man at the bar of this state exercised a greater influence upon the younger lawyers in inspiring in them a high conception of their duties to the

(Continued to page 181)

The Work of the State Bar of California

PROPOSED LEGISLATION AFFECTING ITS OPERATION DISCUSSED

By Philbrick McCoy, of the Los Angeles Bar

AMONG THE BILLS introduced for the consideration of the present session of the Legislature is one to repeal the State Bar Act, while another would reduce the annual fees of active members to $2.50 a year. An amendment to the Constitution is proposed, which, if adopted by the people, would abolish the State Bar of California and create an elective commission for the purpose of regulating admissions to practice, and discipling not only lawyers, but judges as well. It is unnecessary to consider the effect which the adoption of these measures would have.

Disciplinary Proceedings

Of more serious import is a bill which proposes to tie the hands of the Board of Governors by establishing a statute of limitations applicable to disciplinary proceedings, and preventing the filing of charges after a year has elapsed since the commission of an act which would warrant discipline, except in cases of fraud. Passing the question of the validity of such a law, is there any necessity for it? These and similar proposed laws suggest the query: Do the members of the Bar *know* the safeguards already provided against unfounded charges and the method of conducting disciplinary proceedings? The answer can best be found in an analysis of the present rules of procedure in disciplinary cases, for if those rules did not afford adequate protection to the members of the Bar against the filing of unfounded charges, and provide for a fair hearing in every case, then there might be some reason for such a limitation. If there is such protection, then the provisions of the law and of the rules should be enforced in their full vigor, in order that the public may be protected from the dishonest and unscrupulous members of the profession; for, in truth, "whether the legal profession is to be maintained as an honest and honorable calling is a matter of grave general concern. 'No one not a lawyer can fully realize the opportunities for undiscovered peculation, graft, and embezzlement which are afforded the practitioner at the Bar. No one not a lawyer can understand the degree to which the public is entitled to protection from dishonesty in the profession.' (*In re Shepard*, 35 Cal. App. 492, 170 Pac. 442)." *In re Cate*, 60 Cal. App. 279, 212 Pac. 694.

Where Power Rests

In the more than five years of the existence of the State Bar there has been sporadic criticism of the method of hearing disciplinary proceedings. Perhaps some of this criticism has been just, but it is still more probable that most of it has been prompted by a lack of knowledge of the way in which the machinery works, and a lack of appreciation of the fact that the power of discipline rests, not with the Board of Governors, but finally and solely with the Supreme Court. (*In re Shattuck*, 208 Cal. 6, 279 Pac. 998.) "The Board of Governors, when sitting in discipline cases, is an administrative body acting as the administrative arm of this court," (*Fish v. State Bar*, 214 Cal. 215, 4 P. (2d) 937), and it would seem unnecessary to add that there must be some such body to examine the facts of each particular case, if the court is to exercise its jurisdiction and powers in fairness to all concerned.

What, then, is the procedure in such matters? Following the decision by the court in *Herron v. State Bar*, 212 Cal. 196, 298 Pac. 474, in 1931, the Board of Governors, acting pursuant to the authority granted to it by section 37 of the State Bar Act (Stats. 1927, chapter 34, page 38) completely revised its rules providing "the mode of procedure in all cases of complaints against members". These new rules became effective October 15, 1931, and are now found in 213 Cal. at page cxix. Without examining the point involved in this case, we may

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consider the rules so promulgated, which now govern the disposition of all complaints made against members of the State Bar and the hearing and disposition of all notices to show cause which may be issued under the authority of these rules.

Preliminary Investigation

It was said by the court, in the *Herron* case, that the State Bar Act sets up a bureau of investigation and provides for a preliminary investigation of all accusations which may be made. This may follow the receipt of a complaint, either verified or unverified, or even verbal, or it may be initiated by the Board itself. This investigation, which is made by officers of the court, acting under oath and selected for the purpose of ascertaining the probable truth of the complaint as made, affords an opportunity to the attorney to be heard before a proceeding is formally instituted, by the issuance of a notice to show cause. These views of the court are now incorporated in Rule 10 of the Rules of Procedure. It is significant that no "charges" are filed, that is, no formal proceeding is instituted, against an attorney except by the issuance of a notice to show cause by a local administrative committee of the State Bar, directing the attorney, who is designated as the "respondent", to show cause why he should not be "disciplined" by reason of the facts stated therein. This is true even if the preliminary investigation is predicated on a verified complaint.

Designed to be informal, "but thorough, with the object of ascertaining the truth" (*Herron v. State Bar, supra*), this procedure leading up to the issuance of a notice to show cause, must, in reason, be considered as eminently fairer to the members of the Bar than that provided by the provisions of the Code of Civil Procedure, which required all complaints against attorneys to be instituted by the filing of a verified complaint in the Superior Court, where it immediately became a public record, and open to inspection, regardless of its merits; for it must be remembered that every proceeding against an attorney under the rules is conducted in private unless the attorney wishes it to be public, and never becomes public until a recommendation for discipline is filed by the Board of Governors with the clerk of the Supreme Court, as required by section 26 of the act.

Ample Machinery Provided

The court further said, in *Herron v. State Bar,* that, "when a hearing is decided upon, it is not even contended that the act does not provide ample machinery for the safeguarding of every right" of the respondent. Thus we find that, by section 35 of the act, "any person complained against, as herein provided, shall be given reasonable notice and have a reasonable opportunity and right to defend against the charge by the introduction of evidence, and the right to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or produce books and papers." All of these unquestioned rights are provided for by the rules, and the court has never found that they have been denied to anyone complained against, though the court has found in a number of cases that the respondents in disciplinary proceedings have failed to avail themselves of their rights. Without referring to the particular rules, it is enough to say here that, in deciding *Herron's* case, the court had as a precedent its decision in *In re Peterson,* 208 Cal. 42, 280 Pac. 124, where it said: "Nor does a proceeding under the State Bar Act deprive anyone of property or right without due process of law, since notice and hearing are provided for, and a hearing is given in the court of last resort."

Opportunity Given Accused

When the Board of Governors has made its decision, a certified copy thereof, together with the record, is filed with the clerk of the Supreme Court. It is important to note, however, that before making a decision the respondent is not only furnished with a copy of the findings and report of the committee and given an opportunity to submit a statement in opposition thereto, which may include

an application for the presentation of new evidence or a hearing *de novo* (Rule 32), but he is also given an opportunity to be heard orally before the Board (Rule 33). It is still more important to remember that "the affirmative vote of the majority of the entire Board of Governors is required for a recommendation of suspension or disbarment." (Rule 34.)

When the decision of the Board has been filed with the court, the respondent may, within sixty days, petition the court to review and modify or reverse the decision. This petition must be filed in the manner provided by rule of the court (213 Cal. lxxix), and on this review the burden is on the petitioner "to show wherein such decision is erroneous or unlawful". (State Bar Act, sec. 26; *Aydelotte v. State Bar,* 209 Cal. 737, 290 Pac. 41). As already stated, the court alone has the power to enter an order disciplining the attorney involved.

Purpose of Proceedings

A disciplinary proceeding is not brought for the purpose of punishing the attorney, but for the purpose of preserving the courts of justice, and the public, from the official ministrations of those demonstrably unfit to engage in the practice of law. As having a bearing on the fairness of the procedure established for the conduct of disciplinary proceedings and the hearing of all complaints, it is significant that, in a period of more than five years, the court has granted petitions for review and entered final orders in proceedings involving forty-five attorneys, yet, in all but two of those cases, the findings of misconduct as made by the Board have been affirmed, while one of the remaining matters was dismissed without prejudice to further proceedings at a later date.*

The Proposed Limitation

Finally, let me say with reference to the proposed statute of limitations in disciplinary proceedings that an examination of the facts which form the basis of the decisions which have been made by the court in proceedings under the State Bar Act fully warrants the application of the rule as stated by the court many years ago, in *In re Tyler,* 107 Cal. 78, 40 Pac. 33, that "the same principles which authorize the court to entertain charges against an attorney of violating his professional duties, irrespective of any civil or criminal proceedings against him, render the bar of the statute of limitations against a civil or criminal proceeding an immaterial element. The statute of limitations never deprives a court of jurisdiction, even where it is a defense to the action or proceeding," and, we may add, never should.†

Even standing alone, the work of the profession, through the Board of Governors and its committees, in "keeping its own house in order" (*Barton v State Bar,* 209 Cal. 677, 289 Pac. 818), justifies the continuance of the State Bar and is a sufficient argument against repeal of the act. Certainly this record of the ultimate disposition by the court of disciplinary proceedings had under provisions of the State Bar Act, and the Rules of Procedure, justifies the comment by the court in *Herron v. State Bar:* "With competent officers, acting conscientiously and impartially, who can say that this system is inferior to or less just than that provided in the code? What innocent man would not prefer this method of handling a complaint to a public proceeding against him resting alone upon the affidavit of a partisan, if not a prejudiced client? There is nothing in this proceeding which in any way weakens our firm belief that the Board of Governors and committees acting under it are all competent, patriotic and unselfish members of the profession, acting for its best interests, it is true, but in full sympathy with all rights and privileges of the members as attorneys at law."

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* Note: The decisions of the Board denying two petitions for reinstatement because of failure to show adequate moral rehabilitation have also been affirmed. Of the twenty-nine disbarment orders in effect on January 31, 1933, only seven were entered after a review, the others being made on the record as filed; six of the twelve suspension orders in effect on that day (in disciplinary cases) were likewise entered on the record, in the absence of petitions for review.

† Note: See notes in 45 A. L. R. 110; 95 Am. Dec. 342; 2 Am. St. Rep. 860; and see 2 R. C. L. 1106.

LAW STUDENT BAR ASSOCIATION

DUKE UNIVERSITY STUDENTS ADOPT PLAN TO TRAIN FUTURE LAWYERS IN THEIR PROFESSIONAL RESPONSIBILITIES

By D. Bruce Mansfield,* of Duke University Bar Association

ONE OF THE DIFFICULTIES encountered by all bar associations is the problem of bringing the young attorney within the ranks of the organized associations, and to make him feel the proper sense of responsibility, not only to the profession but also to the public.

At the present time the average law student has no opportunity for contact with the older members of the bar, such as was afforded under the "fast-fading law office education." The work to be done in bar associations should fall on the younger members of the profession to a greater extent than is possible under present conditions.

Student Bar Associations

In order to bring about this professional consciousness in law students, a new branch of legal education has developed—student bar associations. The first student bar association was organized four years ago at the University of Southern California Law School at the suggestion of Mr. Justin Miller, then dean of the law school.

Two years ago, also at the suggestion of Dean Miller, a similar association was organized at the Duke University Law School. The theory behind the Duke Bar Association is that law students about ready to enter upon the practice of law are just as capable to discuss certain types of problems which arise in the legal profession as the young attorney who has successfully passed a bar examination, and who has begun the practice of law; and only by direct contact with these problems which face bar associations can this sense of professional pride be instilled in the student.

Form of Association

The Duke Bar Association is not the ordinary student association with a new name. It is essential that this distinction be kept in mind. It is not an organization for the management of student affairs, more or less social in nature; it is not an organization of students for the mere purpose of listening to lectures on legal subjects; nor is it an organization for the purpose of doing additional work in those subjects regularly taught in the law school.

The form of organization of the Duke Bar Association is based upon that of the American Bar Association. Naturally there are variations to meet student needs. For example the membership is composed of all students who are in good standing in the Law School, with the faculty of the Law School as honorary members. The Constitution of the Bar Association provides for a president, from the third year class, three vice-presidents who are the respective presidents of the three classes in the Law School, a secretary from the second year class, and a treasurer from the first year class. These officers, who are elected for a term of one year, constitute the Executive Committee, which committee carries out the business affairs and manages routine matters of the Bar Association.

The Association itself is divided into nine sections: Legal Education, and Admissions to the Bar; Legislation; Constitutional Amendments; Law School Affairs; Grievances and Professional Conduct; Criminal Law and Criminology; Comparative Law; Publications; and Legal Aid Work.

Section Work

Each section during the year prepares a report dealing with some important problem in its field which is submitted to the entire Association at one of the regular meetings, which are held at least once every month. In addition to these reports men of prominence in the legal profession appear before the Association. If it is found feasible the address of the outside speaker will supplement the section report presented at that meeting. In this manner the subject matter of any particular meeting may be co-ordinated and unified. Furthermore, it is the practice to complete the year's program with a meeting more formal than the regular monthly meeting to which are invited the entire university, as well as interested members of the general public. A person of outstanding ability and of national prominence delivers an address on a subject, which, although related to the legal profession, is general in scope, in order that it may appeal to the guests as well as the members of the Bar Association. It will

* Written for *The Bulletin*. Mr. Mansfield is chairman of the Section of Publications of the Duke Bar Association.

thus be seen that the program carried out by the Duke Bar Association over the period of a year is comparable to the more intensified programs of the American Bar Association and the alert state bar associations, and this, of course, has been the aim of the Association.

Board of Governors

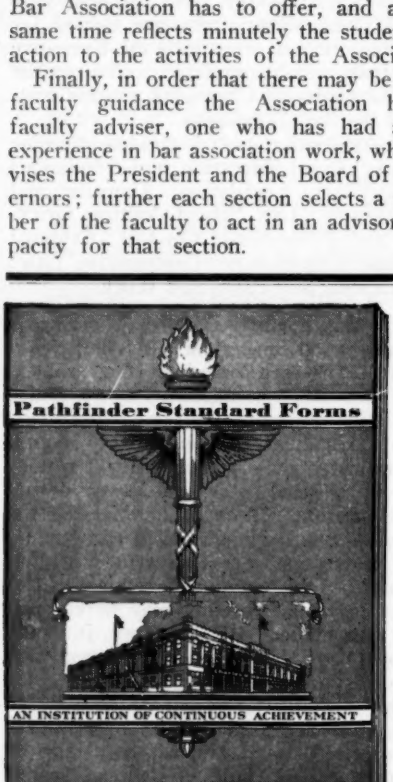
The chairmen of the different sections together with the Executive Committee constitute the Board of Governors. Since the section chairmen are usually selected by the President of the Association from the third year class on the basis of their ability, it follows that the Board of Governors brings into organized expression the best men the Bar Association has to offer, and at the same time reflects minutely the student reaction to the activities of the Association.

Finally, in order that there may be some faculty guidance the Association has a faculty adviser, one who has had actual experience in bar association work, who advises the President and the Board of Governors; further each section selects a member of the faculty to act in an advisory capacity for that section.

Honor System

Besides the regular Bar Association work, that is, the regular meetings, with the section reports and addresses, the Duke Bar Association has attempted to carry out several other projects. There has been inaugurated a system known as the "Professional System." This is based upon the theory of the honor system, as it is in effect in a number of colleges and universities, except that the entire question has been approached from a professional point of view on the theory that those who expect to become active members of the bar should assume responsibilities analagous to those that accompany membership in the legal profession.

It is a regrettable fact that as a general rule a member of the legal profession is far too hesitant in assuming any responsibility for the conduct of his fellow members of the bar. Even though he, himself, may be following the strictest canons of legal ethics, his responsibility does not end there. It is because of a misconception of this kind and the resulting lack of action that the profession as a whole has been subjected to much derogatory criticism from the public.



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"HOLD YOUR TONGUE"

BOOK REVIEW

By Maurice Saeta, of the Los Angeles Bar

I am calling attention of the readers of the Bulletin to the book, bearing the above title, authored by Morris L. Ernst and Alexander Lindey, because, being primarily meant for the layman, they might overlook it, to their detriment, for it is a book that can be read by the lawyer with pleasure and profit. The book is colorful, racy and journalese, full of anecdotes, strange bits of legal lore, gossip and slanderous tales.

Despite the facetious and flippant tone of the book and the many gratuitous flings at the expense of the lawyer, there is a strong undercurrent of feeling, a passionate protest against our times, its corruption, political chicanery and injustice. Slander and libel are merely used by the authors to evaluate our political, economic and social institutions, the book being a cross-section of our times. The thesis of the authors is that the principal remedy for our social ills lies in freedom of expression, without legal reprisal; that as time goes on the need for publicity will be greater; that the interests of the individual and society are irreconcilably antagonistic and that if an innocent person suffers now and then, it is for the common good.

The ideal so eloquently voiced by Warren and Brandeis in 1890 of the right of the individual to be let alone, his right to privacy, has not only failed to materialize, according to the authors, but is doomed to failure in the future. They show that our debunking era has degenerated into drivel and drool, and that gossiping columnists, peep-hole preachers and tittle-tattle tabloids have taken the place of the virile muckrakers of old, and have whittled down whatever rights the individual had against the invasion of his privacy.

When the authors point out the incongruities and inconsistencies of the law of slander and libel; the preposterous distinctions between slander and libel, in the light of the radio and the talkies; the absurdity of having no criminal slander law, California being one of the exceptions, the reader may laugh, wonder or cry, depending upon his reactions to the authors' human interest stories, "believe it or not" collection of adjudicated cases, or ironic comments, but indifferent he will never be to slander and libel, for his eyes have been sharpened and his ears properly attuned and his mind stirred with a new vision.

(Continued from page 174)

courts, to their clients and to the public. It also may be said justly and truly that he engendered in his fellow members of the profession not only respect but great personal regard and affection; for he was personally a genial and attractive man.

"That the professional character and conduct of William J. Hunsaker were habitually adjusted to motives and principles such as those we have here made the subject of comment, was known to the courts in which he ministered, to his comrades of the Bar, the clientage which he served, and to his fellow citizens of all degrees of acquaintanceship who had the opportunity to know him well.

"E. W. BRITT, OSCAR LAWLER, LOYD WRIGHT,
HUBERT T. MORROW, LOUIS W. MYERS, FRANK JAMES,
Committee."

The Board of Trustees accepts and approves the foregoing Memorial of said Committee, and it resolves as the declaration of the feeling of its members, shared they believe by all members of the Bar Association, that they are profoundly sensible of the loss sustained by the Association and the entire State Bar in the death of William J. Hunsaker; as a man, a citizen, and a lawyer he was among the foremost representatives of the state. And it is further resolved that to attest our sentiments in this behalf a certified copy of these resolutions—including a copy of said Memorial of the Committee—be transmitted by the Secretary to the family of the deceased, and that a like copy be presented to the courts in which he was most accustomed to practice, with the request that such courts, respectively, take appropriate note of the same, namely:

Superior Court of Los Angeles County.
U. S. District Court,
Southern District of California.
Supreme Court of California.
Court of Appeal of the Second Appellate District.

Recent Income Tax Decisions of Supreme Court of United States of Interest to Oil Industry of California

By Joseph D. Brady of the Los Angeles Bar

THE SUPREME COURT of the United States has recently decided two cases which should hold a large measure of financial interest to California taxpayers.

Murphy Oil Company v. Burnet, decided December 5, 1932, in favor of the Government, involved the question of depletion of oil bonuses.*

Palmer v. Bender, decided adversely to the Government on January 9, 1933, involved the further question whether the recipient of an overriding royalty is entitled to a depletion deduction with respect to such income.

Murphy Oil Case

While the decision of the Supreme Court was adverse to the Murphy Oil Company, it will be helpful to other taxpayers, who have been recipients of oil bonuses, particularly where, at the time the bonus was paid, the leased property was not proven oil property.

The Murphy Oil Company, in a case involving its tax liability for the years 1919 and 1920, contended that a bonus of over $4,500,000 received several years before 1919, was entirely income at the time of its receipt, did not to any extent represent a return of its capital investment in the leased property, was not subject to depletion, and therefore should not be reflected in a computation of the amount of its capital remaining, as of January 1, 1919 and January 1, 1920, to be recovered through depletion allowances.

This view was adopted by the Board of Tax Appeals, but was rejected by the Circuit Court of Appeals and by the Supreme Court. The latter Court, speaking through Mr. Justice Stone, said in part:

> "* * * when the execution of an oil and gas lease is *followed by production of oil*, the bonus and royalties paid to the lessor both involve at least some return of his capital investment in oil in the ground, for which a depletion allowance must be made * * *. * * * A distinction between royalties and bonus, which would allow a depletion deduction on the former but tax the latter in full as income, when received, making no provision for a *reasonably anticipated production of oil* on the leased premises, would deny the 'reasonable allowance for depletion' which the statute provides." (Italics supplied.)

While the decision in the *Murphy Oil* case sustained the Regulations of the Treasury Department, the language of the opinion has brought about a moderation of the Department's construction of its Regulations as applied to certain situations. For example, the Department, in 1927, issued a ruling known as I. T. 2384. It held therein that the right to the 27½% depletion allowance with respect to any bonus, royalties and other income from oil and gas properties was dependent on the existence of an oil and gas well on the property *at the time the lease was made*. In January, 1933, and based on the language of the *Murphy Oil* opinion quoted above, the Department issued a ruling, known as G. C. M. 11384, in which the rule of I. T. 2384, *supra*, was relaxed somewhat. It is now stated that percentage depletion will be allowed in the following situations:

(1) No oil being produced when the bonus was received, but future production practically assured because of near-by wells and geological conditions.

(2) No oil being produced when the bonus was received, but property became productive within the taxable year.

I. T. 2384, *supra*, will doubtless furnish a basis for savings in income taxes in many cases.

Palmer v. Bender

For a long time the Treasury Department has taken the position that an assignor of a leasehold interest in oil and gas properties was not entitled to a depletion deduction with respect to income received by reason of such an assignment, whether by way of

* The decision of the Circuit Court of Appeals for the Ninth Circuit in the *Murphy Oil* case was discussed by this writer in the February 18, 1932, number of the Bulletin.

bonus or overriding royalty. This view has had the approval of the Board of Tax Appeals and of the Circuit Court of Appeals for the Fifth Circuit. (*Waller v. Commissioner*, 16 B. T. A. 574, affirmed 40 Fed. (2d) 892; *Herold v. Commissioner*, 17 B. T. A. 933, affirmed 42 Fed. (2d) 942; and *Palmer v. Bender*, 57 Fed. (2d) 32.)

The basis of these decisions is, that while a sublessor is entitled to a depletion allowance with respect to a bonus or royalties, no such allowance is available to one who has transferred his interest as lessee by means of an assignment.

But the Supreme Court of the United States took a much broader view. It held that the right to a depletion deduction with respect to a bonus or overriding royalty was not dependent upon the distinction between an instrument of assignment and a sublease. The important consideration, said the Supreme Court, was that after the transfer of his interest by the taxpayer-lessee, he retained, by his stipulation for royalties, an economic interest in the oil, identical with that of a lessor.

It is interesting to note that the reasoning of the Supreme Court, rejecting that of the Circuit Court of Appeals, is the same as that of District Judge Dawkins, who ruled in favor of Bender, the Collector of Internal Revenue, only because of the controlling authority of the *Waller* and *Herold* cases, *supra*.

It is understood that assignment, rather than sublease, is the method by which many California lessees have transferred their leasehold interests in oil properties. To such taxpayers the decision in *Palmer v. Bender* should mean either that refunds are obtainable (subject to the statute of limitations) or that demands for additional taxes will be withdrawn by the Government.

(*Continued from page 168*)

Foreman: What do you say to this suggestion: Let's go to lunch and when we come back, we'll tell the court we're hopelessly disagreed.

Chorus of Jurors: O'kay, let's go!

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